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Ms. Marlene H. Dortch April 2005 Office of the Secretary FILING

VIA ELECTRONIC

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FEDERAL COMMUNICATIONS COMMISSION 445 12th Street, SW Washington, DC 20554

Re: American Cable Association Petition for Rulemaking, RM-11203

Dear Ms. Dortch:

I am President and Chief Executive Officer of the National Cable Television Cooperative, Inc. ("NCTC") -- the buying cooperative for smaller cable companies. Our members include over 1100 companies that would be affected by ACA's Petition. NCTC has existed for 20 years, and has never before submitted an FCC filing. We are submitting this letter today, however, to express NCTC's strongest possible support for ACA's Petition. The ACA's Petition accurately describes a looming crisis for smaller cable companies. Broadcasters have expressed plans to escalate dramatically the "price" for retransmission consent, and are targeting smaller cable companies for higher cash demands, which would add several dollars per month to the cost of the basic tier. This has created intense anxiety about the months ahead among our members. NCTC's unprecedented filing reflects both that level of concern and our conclusion that the limited, market-based solution proposed by ACA will help solve the problem. Without the adjustments proposed by ACA, consumers served by smaller distributors will either (i) pay sharply higher basic cable rates or (ii) face the very real prospect of losing access to network stations. This will truly be a crisis in rural America, and no public policy supports it. By granting ACA's Petition and permitting smaller cable companies the option to consider lower cost sources of programming, the Commission will enable market forces to achieve efficient pricing for retransmission consent, the price for retransmission consent will come down, and millions of consumers served by NCTC members will benefit.

## NCTC Background

NCTC negotiates agreements with satellite programmers and equipment vendors to obtain better prices and terms for our members, focusing primarily on • Page 2 April 15, 2005

agreements that are national in scope. We are the industry's experts in transactions involving the smaller cable sector. Since our beginning in 1984, NCTC has grown to fill a vital role in the cable industry, working for more than 1100 small cable member companies serving an aggregate of more than 9 million subscribers -- virtually the entire small cable sector. I have had the privilege to lead NCTC ever since it was founded. It is a wonderful organization staffed with superb executives with experience in cable programming, small cable company operations, and major MSO operations. We have negotiated prices, terms and conditions for thousands of transactions, including transactions with all the major media conglomerates. From this experience, NCTC has a deep knowledge of the business issues facing our members, and we understand the dynamics and economics of transactions between smaller cable companies and the major media organizations better than anyone. Although we do not negotiate retransmission consent, which is inherently a local transaction, we have received a wealth of information over the years about what happens in retransmission consent negotiations involving both large and smaller cable companies.

## Why NCTC Supports ACA's Petition

NCTC supports ACA's Petition for three principal reasons –

- The problem of retransmission consent "pricing" is very real. Without some changes, retransmission consent "pricing" could easily cost smaller cable companies and their consumers more than an additional \$1 billion over the next three years. This will hurt consumers and limit competition.
- Smaller cable companies are especially vulnerable to broadcasters' pricing strategies. The price for retransmission consent is rising so sharply because broadcasters and networks are using regulations and contracts to impede marketplace pricing. The disparity in market power between broadcasters and smaller cable companies makes smaller cable companies "low hanging fruit" for this strategy.
- The limited solution proposed by ACA will allow the marketplace to moderate the price of retransmission consent and thereby benefit consumers and competition. The solution proposed by ACA is: when a broadcaster wants a "price" for retransmission consent, smaller cable companies should be permitted to "shop" for lower cost alternatives. This solution is simple and market-based, and it is deregulatory, pro-consumer, and pro-competition.

## The problem of retransmission consent "pricing" is very real.

ACA's Petition estimates that broadcasters new cash demands will cost smaller cable companies at least \$864 million over the next three-year cycle of retransmission consent. ACA's estimate is based on cable systems carrying each of the "Big Four" networks (ABC, CBS, NBC, and Fox), and each of those stations charging an average of

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\$0.75 per subscriber per month. NCTC believes that the ACA's estimate is conservative, and that the cost will likely be higher for at least two reasons. First, since some broadcasters have already demanded that small cable operators pay \$1 per subscriber per month, the ACA's average cost of \$0.75 per major network may be low. Disney/ABC has stated that it will charge between \$0.70 and \$0.80 per subscriber per month, while arguing that their stations are worth in excess of \$2 per subscriber per month. If unchecked, nothing short of the loss of carriage of Disney/ABC's signals will prevent it from migrating its price to \$2. We expect the other major networks will follow suit. In particular, at least two of the other Big Four have also asked for cash consideration in the same price range as Disney/ABC. Second, ACA limits its estimate to the demands from the Big Four. Other networks and stations, e.g., broadcasters affiliated with WB and UPN, are also already seeking cash consideration in the range of \$.25-.35 per subscriber per month, knowing their demands are backstopped by their ability to block access to other affiliates. Accordingly, we believe the added costs of retransmission consent pricing in the smaller cable sector will more likely exceed \$1 billion over the next three years.

Most, if not all, of this increased cost will be borne by consumers. As stated by the Commission in paragraph 209 of your Order in the News Corp./DirecTV transaction, when a company uses retransmission consent to extract higher fees, "these fees are unlikely to be absorbed by the MVPDs, but would be passed on to consumers in the form of higher rates." The same is true here. That is bad policy and should not happen.

A related problem is that higher costs and rates for smaller cable companies will hurt their ability to compete. All NCTC members compete against DirecTV and EchoStar -- companies with far greater resources to deal with retransmission consent. Some NCTC members also compete directly with major MSOs. Congress and the Commission have worked hard to help competition flourish. The new "price" for retransmission consent will threaten the competitiveness of smaller cable companies versus their larger competitors, causing even further harm to consumers.

## Smaller cable companies are especially vulnerable to broadcasters' pricing strategies.

ACA's Petition describes how broadcasters use a combination of exclusivity regulations and network affiliate contracts to create barriers around each DMA to block carriage of stations that could provide lower cost alternatives. We agree with the ACA that these barriers serve a legitimate public policy when used to protect advertising markets for ad-supported broadcast stations. When used to <u>support and inflate an artificially high "price"</u> for retransmission consent, however, consumers are harmed.

This problem is especially acute for smaller cable companies. NCTC has seen first hand how larger organizations take advantage of the limited resources and

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bargaining power of smaller companies. Through the NCTC, our members gain both expertise and "strength in numbers," and conditions improve with regard to the nationally-distributed programming carried by our members. Due to the inherently local nature of retransmission consent negotiations, however, NCTC does not negotiate such transactions. Consequently, smaller cable companies are on their own against corporate staffs of networks and affiliate groups. This, combined with the market power of network stations, means the broadcasters have maximum leverage to extract higher retransmission consent "prices" from smaller cable companies.

NCTC also has insight into how the major MSOs deal with retransmission consent negotiations. Like other transactions, the negotiation of retransmission consent is fundamentally different when the distributor is a large cable company. Major MSOs like Comcast, Time Warner, or Cox, or either of the DBS providers, possess far greater resources, expertise, and market power than a smaller cable company. In many cases, the prices, terms, conditions achieved by the largest operators are significantly better than those that can be obtained by our members. "Volume discounting" accounts for only a part of this. Disparities in market power account for the rest. The Commission has recognized this disparity in many areas, and has accommodated the circumstances of smaller cable companies. In the News Corp./DirecTV Order, paragraph 176, you discussed this very issue, stating: "we agree with ACA to the extent that it argues that small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increase for "must have" programming. . . . " This sort of disparity is exactly what our members are facing. In short, smaller cable companies, and their consumers, are "low hanging fruit" for the broadcasters' pricing strategies.

The limited solution proposed by ACA will allow the marketplace to moderate the price of retransmission consent and thereby benefit consumers and competition.

The ACA's proposal will work in the marketplace. ACA's proposal recognizes several fundamental aspects of broadcast signal carriage. First, there is value to a local broadcaster of being carried on a cable system, and there is value to a cable operator in carrying network and local programming. Second, that exchange of value can be determined through negotiations. Third, the problem is how that value exchange is currently "priced." In the absence of alternative suppliers, broadcasters are demanding extraordinary, artificially-supported prices, and setting them as high as possible. Fourth, when a supplier faces competition, the supplier responds by improving the product, lowering the price, or both. At NCTC we see this basic element of pricing theory in practice daily, and it works.

In limited circumstances, ACA's proposal will create a marketplace for retransmission consent by removing impediments that currently prevent a smaller cable company from negotiating carriage with an out-of-market broadcaster. We believe ACA's proposal will work like this:

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• In most cases, price negotiations between an in-market broadcaster and a smaller cable company will result in an agreement with a "price" for retransmission consent that the parties agree fairly approximates the value of the exchange. Consumers will continue to receive the station. Also importantly, we anticipate that the agreement will likely provide the exclusivity protection the broadcaster desires.

- In some cases, price negotiations between an in-market broadcaster and a smaller cable company may result, at least initially, in an impasse. The smaller cable operator would be able to seek out and negotiate with an out-of-market broadcaster at a price that may (or may not) be lower than the price requested by the in-market broadcaster. The critical point is that the smaller cable company would have a choice.
- The smaller cable company can evaluate the difference in value between the stations. Similarly, the in-market broadcaster can evaluate the difference in value between its initial price (which it may now need to re-evaluate in light of the presence of a competitive supplier) and not being carried. With the potential of losing distribution to an alternative supplier, an in-market broadcaster that concludes carriage is more valuable than its initial price may lower its price. Conversely, if the in-market broadcaster values its "price" more than distribution on a smaller cable system, it will not agree to carriage at a lower price, and it can withdraw its signal. From a pricing perspective, either outcome is an efficient transaction. the essence of marketplace pricing. If the in-market broadcaster and the smaller cable company do not reach an agreement, the smaller cable company can complete negotiations with another supplier

Knowing the marketplace and NCTC members as we do, I am confident that ACA's proposal will result in smaller cable companies continuing to carry local broadcasters through a fair exchange of value. To be clear, NCTC members recognize that local network stations have value to their cable businesses, that inmarket broadcasters are generally strongly preferred over out-of-market broadcasters, and that carriage of those in-market stations on their cable systems have value to broadcasters. Only in rare cases, and only as a last resort, do we think NCTC members will distribute out-of-market stations, and only then to avoid large increases in basic rates due to retransmission consent costs. Marketplace pricing will work, and consumers and competition will benefit.

In closing, let me emphasize NCTC's strongest possible support for ACA's Petition, and extend my personal commitment for NCTC to assist the Commission in this proceeding.

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Respectfully submitted,

Michael L. Pandzik President and CEO